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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1647

FEDERAL MARITIME COMMISSION, PETITIONER

v.

SEATRAIN LINES, INC.; PACIFIC FAR EAST LINE, INC.; THE OCEANIC STEAMSHIP CO.; AND UNITED STATES OF AMERICA, RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARGUMENT

I. THE ISSUE OF WHETHER THE FEDERAL MARITIME COMMISSION ERRED IN DENYING RESPONDENT SEATRAIN LINES, INC., A HEARING IS NOT PROPERLY BEFORE THIS COURT

Respondent, Seatrain Lines, Inc., at pages 25 *et seq.* of its Brief asserts that the Commission erred in failing to hold a formal evidentiary hearing prior to approving Agreement No. 9903 and in denying standing to Seatrain. Seatrain urges this Court to resolve "the issue which sparked this litigation" and hold that if the Commission has jurisdiction over the subject agreement, the judgment of the court below

be amended in Seatrain's favor to order the case remanded to the Commission with instructions to hold a formal evidentiary hearing and grant Seatrain standing to appear at such hearing.

The Petition for a Writ of Certiorari raised a single issue, to wit, whether the Federal Maritime Commission has jurisdiction under Section 15 of the Shipping Act, 1916, over agreements providing for the acquisition of assets of one carrier by another. Respondent Seatrain filed a Memorandum in Opposition to the Petition. Neither Petitioner nor Respondent Seatrain at the time of the Petition (nor any of the other respondents) raised as an issue the propriety of the Commission's denial of a formal hearing.

This Court has frequently stated that the only means by which a respondent can raise an issue not brought before the Court in the original petition for a writ of certiorari is via a cross-petition for certiorari. Most recently, this Court declared that the only issue before it was that raised by petitioner, "[s]ince no cross-petition for certiorari was filed by the respondent. . . ." *Brennan* v. *Arnheim & Neely, Inc., et al.*, —— U.S. —— (1973) (No. 71-1598, decided February 28, 1973, slip opinion at 4).[1]

[1] For other cases standing for the proposition that if a respondent wishes to raise an issue not raised by petitioner, it must do so by cross-petition, see *NLRB* v. *International Van Lines*, —— U.S. ——, 34 L. Ed. 2d 201 (1972); *Alaska Industrial Board* v. *Chugach Electric Assn.*, 356 U.S. 320, 325 (1958); *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 431-432 (1942); *Letulle* v. *Scofield*, 308 U.S. 415, 421-422 (1940); *Morley Construction Co.* v. *Maryland Casualty Co.*, 300 U.S. 185, 191 (1937).

The hearing issue was the principal matter brought before the court below for review. However, because of that court's disposition of the jurisdiction question, it never reached the hearing issue which Respondent Seatrain now attempts to resurrect. Since the hearing question in the instant case was treated only in dictum and not passed upon by the court below, this issue has even a lesser standing than matters dealt with in the above-cited cases, which involved issues upon which the lower courts had ruled. Respondent Seatrain, therefore, presents even less justification for departing from the rationale of the foregoing authority requiring a cross-petition by respondent to place a new issue before this Court. This view is supported by *Rorick* v. *Devon Syndicate, Ltd.*, 307 U.S. 299, 303 (1939), in which this Court held that "[o]f the various questions raised below and briefed here, only those urged in the petition for certiorari and incidental to their determination will be considered on review." Likewise, in *Connecticut Ry. & Lighting Co.* v. *Palmer et al.*, 305 U.S. 493, 496 (1939), "certiorari was granted to review only the matter which this Court was advised aggrieved petitioner."

It is submitted that the only issue properly before this Court is the jurisdictional issue raised in the Petition for a Writ of Certiorari; Respondent Seatrain, having failed to appropriately raise any other issue, cannot now be heard to say that there is before this Court a subsidiary issue in addition to that raised by Petitioner.* Thus, if this Court determines that

*It is to be noted that Respondents PFEL and Oceanic take the same position on this point. See Brief of Respondents PFEL and Oceanic at 33, n. 34.

the Commission has jurisdiction over Agreement No. 9903, it is respectfully requested that the Court remand the proceeding to the court below for resolution of the hearing issue.

If, however, the Court determines that the hearing issue is properly before it, then the Commission's decision not to hold an evidentiary hearing should be affirmed for the reasons set forth below.

II. THE COMMISSION'S DECISION NOT TO HOLD A FORMAL EVIDENTIARY HEARING WAS PROPER IN ALL RESPECTS

Respondent Seatrain, in addition to asserting that the Commission erred in failing to hold a hearing, also argues that the Commission erred in denying Seatrain standing. These arguments are essentially intertwined and inseparable, and since both rely upon the same facts and allegations, they are treated below as one for the sake of simplicity.

Seatrain suggests that an evidentiary hearing must be held with respect to any agreement coming before the Commission for Section 15 approval when such agreement is protested and a hearing is requested. Such approach would permit any carrier, whether or not competing in the trade covered by the agreement or in any way immediately affected thereby, to protest and demand a hearing because, potentially, it is a competitor. Actual and potential shippers, terminal operators, overland carriers and other persons associated with the shipping industry could similarly activate a hearing by their protest, irrespective of the protest's merits. It follows from Seatrain's argument that application of the Commission's

expertise in the initial screening and evaluation of proposed agreements should defer to such protests and in every instance an evidentiary hearing be scheduled.

The Commission has developed an extensive internal system for processing and evaluating proposed agreements. Upon receipt of an agreement, a "Notice of Agreement Filed" is immediately published in the *Federal Register;* comments are invited on the proposed agreement by interested parties and whenever any protests or other comments are received, the Commission provides an opportunity for the proponents of the agreement to respond thereto. Together with its own industry knowledge and expertise, the Commission is then able to determine whether a particular protest or comment is meritorious and presents substantial issues so as to justify the need for a formal evidentiary hearing, or whether the protest and comments are merely frivolous. When in the latter situation, the Commission concludes under Section 15's standards that the agreement is justified by a serious transportation need and is not detrimental to the commerce of the United States, or otherwise contrary to the public interest, the agreement has usually been approved without an evidentiary hearing.[4]

[4] Where the facts are generally known to the Commission, it has, in lieu of an evidentiary hearing, permitted parties to a protested agreement to submit their respective positions on affidavits and briefs before a decision is made on the agreement's approvability. *Cf. Persian Gulf Outward Freight Conference* v. *F.M.C.*, 375 F. 2d 335 (D.C. Cir. 1967).

Approval of an agreement by the Commission over protest and without hearing when the protest is without merit has been upheld by the court below. *City of Los Angeles* v. *F.M.C.*, 388 F. 2d 582 (D.C. Cir. 1967). In a later decision, this same lower court has enumerated several categories of Section 15 agreements which could be approved without a hearing including agreements "of purely routine nature," those which "have an impact on commerce that the Commission finds *de minimus*," and agreements of a "restrictive nature" when the "applicant for approval . . . [satisfies] the burden of demonstrating the need for anticompetitive restraints. . . ." *Marine Space Enclosures* v. *F.M.C.*, 420 F. 2d 577, 583–584 (1969). Significantly, the court also observed in *Marine Space Enclosure*, *supra*, at 587, that, "[i]f no protest is filed, or if no substantial issues are raised, it may then be proper for the Commission to proceed and approve the agreements."

In the instant case, Agreement No. 9903 was duly noticed in the *Federal Register* of October 14, 1970 (35 Fed. Reg. 16114), comments were filed by only one party, Seatrain, to which PFEL responded. Upon an analysis of the comments and response thereto, the Commission determined that no serious issues were raised, that the facts established that at the

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[1] Agreements found to be of a "purely routine nature" were the subjects of the following cases: *Port of New York Authority, et al.* v. *F.M.C.*, 429 F. 2d 663, 667–668 (5th Cir. 1970), *cert. denied* 401 U.S. 939; *Empire State Highway Transportation Assn., Inc.* v. *Federal Maritime Board*, 291 F. 2d 336, 338–339 (D.C. Cir. 1961), *cert. denied* 368 U.S. 931; and *Ex Parte 4, Section 15 Inquiry*, 1 U.S.S.B. 121, 125 (1927).

time the Agreement was filed, Seatrain was not involved in the trades which were affected by the Agreement. Any interest of Seatrain in the trades involved, Trade Routes 27 (North American Pacific Coast-Australasian trade) and 29 (United States Pacific Coast-Far East trade), was merely prospective and the Commission concluded that approval of the Agreement would in no way preclude entry by Seatrain at a future date.[3]

Although Seatrain alleged that the "ships to be acquired by PFEL could be used in direct competition with Seatrain in the domestic offshore trade between the Pacific Coast and Hawaii, between Hawaii and Guam, and between the Pacific Coast and Guam" (App. 36), PFEL was restricted under its Operating Differential Subsidy (O.D.S.) agreement with the Maritime Administration to utilize the acquired vessels *only* for the carriage of passengers (including their baggage and automobiles) between the Pacific Coast and Hawaii, and between ports in California on voyages on Trade Route 27. (App. 38, 56.) (Seatrain did not carry passengers.) Further, the acquired ships were not to be used by PFEL on any service to Guam and, therefore, Seatrain's statement above quoted "is inaccurate" (App. 39).

With the foregoing positions of the parties thoroughly set forth in their submissions, and with its knowledge of the O.D.S. restrictions and the trades and commerce involved, the Commission concluded

[3] The Commission's records reflected at the time of Seatrain's protest that at least six other carriers were engaged in Trade Route 27 and 38 carriers served Trade Route 29.

that Seatrain's protest was grounded on mere speculation, and raised no substantial issues. *Marine Space Enclosures, supra*, at 587. Moreover, Agreement No. 9903 was found after careful examination by the Commission, not to be "unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, detrimental to the United States, or contrary to the public interest or violative of the Shipping Act, 1916" (P.A. 53, 54), and, therefore, Seatrain's request for a formal evidentiary hearing was denied and the agreement was approved.

It is submitted that since Seatrain's protest alleging possible prospective entry into trades covered by Agreement No. 9903 did not present any substantial issue necessitating a full evidentiary hearing, and the provisions of that agreement were not of such a nature as to activate the hearing requirement, the Commission properly approved the agreement without a hearing.

CONCLUSION

The hearing issue is not properly before this Court and upon a determination that the Commission has jurisdiction over Agreement No. 9903, this case should be remanded to the court below for a determination on the propriety of the Commission's action in denying Seatrain a hearing.

Alternatively, if the Court concludes that the hearing issue is appropriately before it for consideration, it is submitted that the Commission's decision not to hold a formal evidentiary hearing was proper and should be affirmed.

Respectfully submitted.

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MARCH 16, 1973.

I authorize the filing of the foregoing reply brief.

ERWIN N. GRISWOLD,
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